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No. [redacted] 24

In the Supreme Court of the United States

OCTOBER TERM, 1953

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE [redacted]

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF LOUIS STERNBERGER, THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, EXECUTOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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1. In attempting to deny the existence of conflicts between the decision below and the cases cited in our petition (pp. 7-13), the respondent argues that the latter cases involved types of contingent interests which were different from that involved in the present case and were types which were not subject to present valuation. Our assertion of conflict, however, was not with respect to the question of valuation of contingent charita-

ble interests. We assert that a conflict of decisions exists in that the decision below is contrary to numerous cases which either expressly or impliedly hold that *any contingent* charitable interest, regardless of whether a present value can be placed upon it actuarially, is not deductible where, as here, the possibility that the charity will not take is not so remote as to be negligible.

In discussing *Newton Trust Co. v. Commissioner*, 160 F. 2d 175 (C.A. 1st), the respondent misconstrues the first part of the opinion and ignores the second part (pp. 180-182) on which our assertion of square conflict is based. That case involved a bequest of a charitable remainder of trust corpus subject to a power of invasion in favor of the decedent's wife. In the first part of its opinion, the Court of Appeals for the First Circuit held that the power of invasion was not limited by any fixed standard and thus did not lend itself to a reliable determination of the amount the charity would ultimately receive. The power of invasion thus extended to the entire trust corpus and made the charitable remainder interest *contingent*, and for that reason the Court of Appeals held that under *Merchants Bank* v. *Commissioner*, 320 U.S. 256, the charitable interest was not deductible. In addition, the taxpayer in the *Newton Trust Co.* case also argued that deduction was allowable on the ground that the power of invasion, because it covered the decedent's interest in property held in trust under his father's will, could not be exercised in favor of the decedent's widow until the

death of the decedent's brother. The taxpayer argued that the power of invasion simply constituted a condition to the right of the charity to take the entire trust corpus—that, although the death of the decedent's brother prior to the decedent's widow would defeat the deductibility of the charitable interest, the charity would take the entire corpus if the widow predeceased the brother. The First Circuit answered these arguments by stating that, while it had no doubt that the contingent interest could be valued actuarially as of the decedent's death, the actuarial valuation represented the charity's chances of taking all or nothing, instead of the present value of what the charities would receive, and that no deduction is allowable under Section 81.46 of Treasury Regulations 105 for a *contingent* charitable interest under which the charity's chances of not taking are not so remote as to be negligible. In that connection the court expressly refused to follow *Meierhof* v. *Higgins*, 129 F. 2d 1002 (C.A. 2d), which involved a prior regulation covering conditional bequests but which was cited by the court below as the sole authority for its decision in the instant case involving the identical regulation applied in the *Newton Trust Co.* case.

Similarly, while the respondent may be correct in stating that the Court of Appeals decisions cited on page 12 of our petition involved contingent charitable interests which were not susceptible of actuarial valuation, the cases were decided not on that ground but on the ground that no deduction

is allowable for a charitable interest which is subject to a substantial contingency as of the decedent's death.

Merchants Bank v. *Commissioner, supra,* and *Henslee* v. *Union Planters Bank,* 335 U. S. 595, cannot properly be distinguished on the ground they involved charitable remainders of trust corpus subject to a power of invasion or charitable interests which were not subject to valuation as of the decedent's death. Actually, the charitable interests involved in those cases undoubtedly had a market value, but market value and value based on "an arithmetic generalization of experience" (*Henslee* v. *Union Planters Bank, supra,* p. 599) were held to be immaterial. The respondent concedes that in those cases the claimed deductions were denied because the amount the charity would receive was not determinable for lack of a provision limiting the power of invasion to a fixed standard (Br. 6), but overlooks the significance of the lack of a fixed standard of invasion. The claimed deductions were denied because, for lack of a limitation on the power of invasion, there was a chance that the charity's interest would be diminished or destroyed (see *Henslee* v. *Union Planters Bank, supra,* p. 599); in other words, because the charitable interest was contingent.

2. In addition to presenting a conflict of decisions, the decision below raises the important question whether Section 81.46 of Treasury Regulations 105 is valid. That regulation covers "Conditional bequests" and the first paragraph expressly pro-

vides that no deduction is allowable for a charitable interest which is contingent as of the decedent's death, unless the possibility that charity will not take is so remote as to be negligible. In the *Newton Trust Co.* case the First Circuit applied this provision of the Regulations, thus recognizing it to be valid. However, although the regulation is clearly applicable to the facts of the present case, the court below refused to apply it and thus in effect held it to be invalid.

The decision below creates confusion in respect of the law governing the deductibility of contingent charitable interests. Since bequests of contingent charitable interests occur quite frequently, the decision below will encourage litigation in other cases and complicate the administration of Section 812 (d). The validity of the regulation thus involves an important and recurring question which should be settled by this Court.

It is respectfully submitted that the petition for a writ of certiorari should be granted.

SIMON E. SOBELOFF,
Solicitor General.

MARCH, 1954.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1954 209076 1093